

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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:  
FRANK BILELLO, individually and on behalf of all :  
others similarly situated, : Via ECF  
:  
Plaintiff, :  
:  
Case No.: 07-CV-7379 (DLC)  
:  
vs. :  
:  
JPMORGAN CHASE RETIREMENT PLAN, :  
JPMORGAN CHASE DIRECTOR OF HUMAN :  
RESOURCES, as administrator of the JPMorgan :  
Chase Retirement Plan, :  
Defendants. :  
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**DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION  
FOR RECONSIDERATION OF COURT'S APRIL 10, 2009 ORDER  
REGARDING STATUTE OF LIMITATIONS**

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**TABLE OF CONTENTS**

	<b>Page</b>
PRELIMINARY STATEMENT .....	1
ARGUMENT.....	2
I. PLAINTIFF CANNOT SATISFY HIS “HEAVY BURDEN” TO MEET THE “STRICT” STANDARD GOVERNING MOTIONS FOR RECONSIDERATION.....	2
A. The Court Did Not Overlook Any “Controlling Decision” Relevant To The Motion .....	3
B. Plaintiff Offers No Case Law, Controlling Or Otherwise, That Warrants The Court Reaching A Different Result On Reconsideration.....	5
II. THE DISMISSED COUNTS FAIL AS A MATTER OF LAW .....	6
III. LIMITING COUNT ONE TO THE 1997 PLAN WAS PROPER .....	12
IV. PLAINTIFF CANNOT NOW ASSERT A CLAIM FOR EQUITABLE TOLLING OF THE STATUTE OF LIMITATIONS .....	12
CONCLUSION.....	13

**TABLE OF AUTHORITIES**

**Page**

**Cases**

*Berger v. AXA Network LLC*, 459 F.3d 804 (7th Cir. 2006) .....5

*Brewer v. Lincoln Nat’l Life Ins. Co.*, 921 F.2d 150 (8th Cir. 1990).....6

*Broder v. Cablevision Sys. Corp.*, 418 F.3d 187 (2d Cir. 2005).....9

*Carey v. Int’l Bd. of Elec. Workers Local 363 Pension Plan*, 201 F.3d 44  
(2d Cir. 1999)..... 5, 6, 7

*DeVito v. Pension Plan of Local 819 I.B.T. Pension Fund*, 975 F. Supp. 258  
(S.D.N.Y. 1997) .....7

*Griffin Indus. Inc. v. Petrojam, Ltd.*, 72 F. Supp. 2d 365 (S.D.N.Y. 1999).....3

*Guilbert v. Gardener*, 480 F.3d 140 (2d Cir. 2007).....6

*Herman Miller, Inc. v. Worth Capital, Inc.*, No. 97 Civ. 7878, 1998 WL 226202  
(S.D.N.Y. May 4, 1998).....4

*Hirt v. Equitable Retirement Plan for Employees, Mangers & Agents*,  
441 F. Supp. 2d 516 (S.D.N.Y. 2006) .....5

*Hirt v. Equitable Retirement Plan for Employees, Mangers & Agents*,  
450 F. Supp. 2d 331 (S.D.N.Y. 2006) .....5,7

*Jones v. Ga. Pac. Corp.*, 90 F.3d 114 (5th Cir. 1996) .....6

*Koehler v. Bank of Bermuda Ltd.*, M18-302(CSH), 2005 WL 1119371  
(S.D.N.Y. May 10, 2005).....3, 12

*Mansker v. TMG Life Ins. Co.*, 54 F.3d 1322 (8th Cir. 1995).....6

*Pharr v. Evergreen Gardens, Inc.*, No. 03 Civ. 5520 (HB), 2004 WL 487315  
(S.D.N.Y. Mar. 11, 2004) .....4

*Romero v. The Allstate Corp.*, 404 F.3d 212 (3d Cir. 2005) .....5

*Saltzman v. Kross*, No. 00 Civ. 1186, 2006 WL 516795 (N.D.N.Y. Feb. 28, 2006).....6

*Sequa Corp. v. GBJ Corp.*, 156 F.3d 136 (2d Cir. 1998).....3

*Shrader v. CSX Transp., Inc.*, 70 F.3d 255 (2d. Cir. 1995).....2, 3

*Union Pac. R.R. Co. v. Beckham*, 138 F.3d 325 (8th Cir. 1998) .....5

*Velez v. Sony Discos*, No. 05 Civ. 0615 PKC, 2007 WL 1098698 (S.D.N.Y. April 10, 2007) .....3

**Rules**

LOCAL RULE 6.3 .....2

Defendants respectfully submit this memorandum of law in opposition to Plaintiff's Motion for Reconsideration of Court's April 10 Order Regarding Statute of Limitations (the "Motion").

### **PRELIMINARY STATEMENT**

Plaintiff's Motion should be denied because it fails to satisfy the requirements of a motion for reconsideration and because, in any event, the Court's dismissal on statute of limitations grounds of certain Counts of the First Amended Class Action Complaint (the "Complaint") was plainly correct.

In its Order dated April 10, 2009 (the "April 10 Order"), this Court dismissed on statute of limitation grounds Counts 1, 2, 4 and 6 of the First Amended Class Action Complaint (the "Complaint") in their entirety, and Counts 3<sup>1</sup>, 7 and 8<sup>2</sup>, in part (collectively, the "Dismissed Counts"). The Court reached this decision after the parties had a full opportunity to brief the issue in connection with Defendants' Motion to Dismiss, and after engaging in its own analysis of the plan communications that formed the underlying factual basis for this decision.

Courts within the Second Circuit strictly adhere to the standard that reconsideration is appropriate only when the district court has "overlooked" either "controlling

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<sup>1</sup> In a separate Order of this Court, dated April 24, 2009 ("April 24 Order"), the Court dismissed what remained of Count 3 following the April 10 Order on the grounds that "no private action exists under ERISA to enforce the definitely determinable requirement." April 24 Order at 10. Although the April 24 Order only addressed what remained of Count 3 following the April 10 Order, the Court's reasoning behind the dismissal of the remainder Count 3 in the April 24 Order applies equally to those portions of Count 3 that were dismissed on statute of limitations grounds in the April 10 Order and this count should be dismissed for this additional reason. Additionally, as set forth in additional briefing currently pending before the Court, Defendants believe that Plaintiff lacks constitutional standing to pursue, *inter alia*, each of Counts 1-6.

<sup>2</sup> Plaintiff asserts no arguments in its Motion that the partial dismissal of Counts 7 and 8 on statute of limitations grounds was improper. Accordingly, Defendants read Plaintiff's Motion as not seeking reconsideration of these partial dismissals.

decisions” or “controlling data,” or to prevent a “manifest injustice.” Plaintiff falls well short of meeting this exacting standard. In the guise of the framework of a motion for reconsideration, Plaintiff is merely attempting to succeed where he fell short in his Opposition to Defendants’ Motion to Dismiss (the “Opposition”). Instead of identifying any “controlling decisions” overlooked by the Court, Plaintiff argues that the Court “overlooked” or “misunderstood” Plaintiff’s arguments against a dismissal of certain claims on statute of limitations grounds. Essentially, Plaintiff’s Motion is an expression of his disagreement with the April 10 Order in general, and specifically the Court’s interpretation of plan communications, and is merely an attempt to take a second bite of the apple by rearguing the merits. This is not proper and the Motion should be denied.

The Motion should be denied for the additional reason that the Court’s dismissal rulings were correct. The relevant plan communications were sufficiently clear to put Plaintiff on notice more than six years prior to the filing of the Complaint, through the exercise of “reasonable diligence,” of the facts that form the basis of the Dismissed Counts. The case law supports the Court’s holdings and Plaintiff offers no authority, controlling or otherwise, to the contrary.

### **ARGUMENT**

#### **I. PLAINTIFF CANNOT SATISFY HIS “HEAVY BURDEN” TO MEET THE “STRICT” STANDARD GOVERNING MOTIONS FOR RECONSIDERATION**

“The standard governing [reconsideration pursuant to Local Rule 6.3] is strict and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked – matters, in other words, that might reasonably be expected to alter the conclusion reached by the court.” *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d. Cir. 1995); LOCAL RULE 6.3 (requiring the movant to set forth “concisely the

matters or controlling decisions which counsel believes the court has overlooked”). *See also Velez v. Sony Discos*, No. 05 Civ. 0615 PKC, 2007 WL 1098698, at \*1 (S.D.N.Y. April 10, 2007) (“Parties bear a heavy burden in moving for reconsideration”). “Alternatively, the movant must demonstrate the need to correct a clear error or prevent manifest injustice.” *Griffin Indus. Inc. v. Petrojam, Ltd.*, 72 F. Supp. 2d 365, 368 (S.D.N.Y. 1999). “These criteria are strictly construed against the moving party so as to avoid repetitive arguments on issues that have been fully considered by the court.” *Id.* Indeed, the Second Circuit has made clear that a motion for reconsideration is not a vehicle for “securing a rehearing on the merits, or otherwise taking a ‘second bit at the apple.’” *Sequa Corp. v. GBJ Corp.*, 156 F.3d 136, 144 (2d Cir. 1998). *See also Shrader*, 70 F.3d at 257 (“a motion to reconsider should not be granted where the moving party seeks solely to relitigate an issue already decided”). Similarly, “a motion for *reconsideration* cannot assert new arguments or claims which were not before the court on the original motion and consequently cannot be said to have been *considered*.” *See Koehler v. Bank of Bermuda Ltd.*, M18-302(CSH), 2005 WL 1119371, at \*1 (S.D.N.Y. May 10, 2005)) (emphasis in original). Plaintiff fails to meet these strict requirements.

**A. The Court Did Not Overlook Any “Controlling Decision” Relevant To The Motion**

Plaintiff’s Motion is nothing more than a transparent and improper attempt to reargue the merits of the April 10 Order. Although Plaintiff asserts that reconsideration is justified because “the Court overlooked controlling case law and made unarticulated assumptions that conflict with that case law,” Motion at 1, the ensuing fifteen pages of briefing fail to specifically point the Court to any “controlling decisions” that the Court overlooked. Indeed, in the April 10 Order, the Court cited to many of the cases upon which Plaintiff relies in his Motion. Although Plaintiff fails to articulate which, if any, of the cases upon which he relies in

his Motion were overlooked by the Court, it nonetheless remains that Plaintiff primarily focuses on the decisions of other Circuit courts and other district court cases, none of which are “controlling” for the purposes of Rule 6.3. See *Pharr v. Evergreen Gardens, Inc.*, No. 03 Civ. 5520 (HB), 2004 WL 487315, at \*2 (S.D.N.Y. Mar. 11, 2004) (cases “decided by other circuits courts of appeal” are “not controlling case law”); *Herman Miller, Inc. v. Worth Capital, Inc.*, No. 97 Civ. 7878, 1998 WL 226202, at \*1 (S.D.N.Y. May 4, 1998), *aff’d*, 173 F.3d 844 (2d. Cir. 1999) (“[T]he decision of a fellow district court is not a ‘controlling’ one for the purposes of Local Rule 6.3.”).

Notwithstanding Plaintiff’s unsubstantiated assertion that the Court overlooked controlling case law, Plaintiff quickly abandons the pretense and reveals the true basis for his request for reconsideration – that the Court allegedly “failed to fully consider” and “*misunderstood* [Plaintiff’s] main argument: that because the average plan participant could not understand Defendants’ communications, they could not trigger the statute of limitations as a matter of law.” Motion at 1-2 (emphasis added). As is apparent from the argument that follows, this alleged “misunderstanding” is not rooted in the Court’s failure to consider controlling law, but merely upon Plaintiff’s disagreements with the Court’s rejection of Plaintiff’s previously asserted arguments, and the Court’s reading and interpretation of the relevant plan communications.<sup>3</sup> This is not a valid basis for reconsideration, and Plaintiff presents no case law suggesting otherwise.

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<sup>3</sup> That the Court “overlooked” or “misunderstood” Plaintiff’s main argument is belied by the extensive analysis in the April 10 Order. Indeed, it is clear that the Court fully understood Plaintiff’s argument the first time: “Bilello also argues that determining whether a repudiation is ‘clear’ and ‘made known’ to beneficiaries is inappropriate for resolution at the motion to dismiss state because the inquiry requires resolving factual issues involving the interpretation of plan communications.” April 10 Order at 15.

**B. Plaintiff Offers No Case Law, Controlling Or Otherwise, That Warrants The Court Reaching A Different Result On Reconsideration**

The holdings in the April 10 Order are not undermined by any of the case law, none of which in any event are controlling, that Plaintiff discusses in his Motion.

First, *Romero v. The Allstate Corp.*, 404 F.3d 212 (3d Cir. 2005), the case upon which Plaintiff “relied heavily,” Motion at 3, does not warrant a different result. *Romero* merely rejected a “rule that unwaveringly ties the date of accrual to the date of amendment” in favor of “the federal discovery rule, which includes the ‘clear repudiation concept.’” *Id.* at 224. As discussed below, the Court did not tie the date of accrual to the date of the plan amendments, but rather the Court applied the “clear repudiation concept.”

Second, in arguing the relevance of *Hirt v. Equitable Retirement Plan for Employees, Managers & Agents*, Plaintiff conveniently conflates two distinct holdings of the district court. The district court in *Hirt* held that a compliant SPD was required for purposes of curing a deficient ERISA § 204(h) notice. 441 F. Supp. 2d 516, 539-40 (S.D.N.Y. 2006). With respect to the statute of limitations, however, the *Hirt* court held that the compliant SPD triggered the accrual only because it was not until the distribution of this SPD that defendants had sufficiently repudiated the benefit such that the plaintiffs were able to discover the facts giving rise to their claims. 450 F. Supp. 2d 331, 333-34 (S.D.N.Y. 2006), *aff’d* 285 F. Appx. 802 (2d Cir. 2008). The *Hirt* court did not take the leap that Plaintiff suggests, however, and hold that *only* a compliant SPD can trigger a statute of limitations for an ERISA claim. Motion at 5. Further, in none of cases to which Plaintiff cites, *Berger v. AXA Network LLC*, 459 F.3d 804 (7th Cir. 2006), *Carey v. Int’l Bd. of Elec. Workers Local 363 Pension Plan*, 201 F.3d 44 (2d Cir. 1999) and *Union Pac. R.R. Co. v. Beckham*, 138 F.3d 325 (8th Cir. 1998), did the courts require a compliant SPD to trigger the statute of limitations.

Finally, the additional cases to which Plaintiff cites likewise do not dictate a different result. *Mansker v. TMG Life Ins. Co.*, 54 F.3d 1322 (8th Cir. 1995), *Jones v. Ga. Pac. Corp.*, 90 F.3d 114 (5th Cir. 1996) and *Brewer v. Lincoln Nat'l Life Ins. Co.*, 921 F.2d 150 (8th Cir. 1990) were not statute of limitations cases and therefore did not address the relevant legal question here at issue.

## II. THE DISMISSED COUNTS FAIL AS A MATTER OF LAW

The Court must deny Plaintiff's request for reconsideration, not only because Plaintiff's Motion fails to satisfy the requirements of Local Rule 6.3, but for the additional reason that each of the Dismissed Counts fails as a matter of law.

“Courts generally apply the ‘discovery rule’ to determine when an ERISA cause of action accrues, looking to when the plaintiff ‘discovers, or with due diligence should have discovered, the injury that is the basis of the litigation.’” April 10 Order at 10 (citing *Guilbert v. Gardener*, 480 F.3d 140, 149 (2d Cir. 2007); *Carey*, 201 F.3d at 48 (“a plaintiff's claim accrues when he discovers or with reasonable diligence should discover, the injury that gives rise to his claim.”)). *See also Saltzman v. Kross*, No. 00 Civ. 1186, 2006 WL 516795, at \*5 (N.D.N.Y. Feb. 28, 2006) (statute of limitations begins to run “when a claimant knows or should know through an exercise of reasonable diligence, of the acts constituting the alleged violation.”). For purposes of Plaintiff's claims, the statute of limitations will begin to accrue “upon a clear repudiation by the plan that is known, or should be known, to plaintiff – regardless of whether the plaintiff has filed a formal application for benefits.” *Carey*, 201 F.3d at 48.

Contrary to Plaintiff's contention, the statute of limitations for Plaintiff's claims does not accrue from the time a plaintiff becomes aware of a legal theory that forms the basis of a complaint. Indeed, the argument that Plaintiff asserts in his Motion – that only an “ERISA expert” could have determined from the communications that Defendants were violating ERISA

– is based upon a distortion of the manner by which the accrual of statutes of limitations is calculated.<sup>4</sup> Taken to its logical conclusion, Plaintiff would have this Court find that a statute of limitations will never run until a potential plaintiff consults with a lawyer or other “expert.” That is not the law. *See, e.g., id.* at 49 (holding that statute of limitations began to accrue from the time there was a known repudiation in fact and not from when plaintiff learned that the repudiation was improper under the law); *Hirt*, 450 F. Supp. 2d at 333-34, *aff’d* 285 F. Appx. 802 (2d Cir. 2008) (holding that statute of limitations for ERISA § 204(h) claims began to accrue when plaintiff had facts sufficient to know that benefits had been “repudiated,” and not when plaintiff learned of the technical requirements of ERISA § 204(h)).

The Court properly applied the “discovery rule” in dismissing Counts 1, 2, 4 and 6 in their entirety, and Count 3, in part, holding that the “clear repudiation” can, and did, come from plan communications that reveal the factual bases for the Dismissed Counts.<sup>5</sup> Plaintiff’s Motion asserts that the Court failed to consider the clarity of these plan communications in reaching its holdings. This assertion, however, is contradicted by the April 10 Order. Specifically, the Court noted that “[d]iscovering the injury – the illegal provisions that violate ERISA on their face – requires clear notice of those provisions.” April 10 Order at 12. The Court further acknowledged that “without clear notice to participants . . . an amendment to the plan adopting an illegal term or feature is insufficient to trigger the running of the statute of limitations.” *Id.* at 13. It is in this light that the Court analyzed Plaintiff’s claims and the plan

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<sup>4</sup> The case on which Plaintiff primarily relies for this argument, *DeVito v. Pension Plan of Local 819 I.B.T. Pension Fund*, 975 F. Supp. 258 (S.D.N.Y. 1997), was decided pre-*Carey* and the Second Circuit’s pronouncement in that case that “a plaintiff’s cause of action accrues upon a clear repudiation that is known, or should be known, to plaintiff – *regardless of whether the plaintiff formally applied for benefits.*” *Carey*, 201 F.3d at 48 (emphasis added).

<sup>5</sup> As previously noted, Plaintiff does not challenge, and, thus, we do not address, the Court’s dismissal (in part) of Counts 7 and 8.

communications, and held that pursuant to the controlling case law, Plaintiff was on notice of the provisions that form the factual basis of his Complaint:

- Count 1**: Plaintiff’s claim is based on the allegation that the plans needed to specify a fixed minimum interest rate to comply with ERISA. The Court properly held that “[n]o minimum interest rate . . . is mentioned and nothing in the [1999] SPD even remotely suggests the existence of such a rate. Plaintiff was therefore on notice that no such minimum rate existed, and his claim, wholly predicated on the absence of a minimum interest rate, began to accrue by 1999.” *Id.* at 19. This holding is correct, as the omission of any mention of a minimum interest rate was clear. Although the Court focused on the 1999 SPD, there was no suggestion of a minimum interest rate in multiple plan communications dating from the 1990s<sup>6</sup> and plan participants were in no way misled otherwise.<sup>7</sup> Indeed, all of these communications made clear that the interest rate was based on a floating rate, which by definition does not have an assured minimum.
- Count 2**: This claim is premised on the contention that the plans in effect from 1989 to 1997 violated ERISA by providing the Plan Administrator with discretion to set a rate higher than the rate that would apply from application of a referenced index. The Court properly held that the relevant plan communications distributed more than 6 years prior to the filing of the

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<sup>6</sup> See, e.g., Compl. Ex. 3 at JPMC00001736 (explaining interest credit basis for 1991 Chemical CashPlan with no mention of a minimum), Ex. 10 at CBPJPMC00000801 (explaining interest credit basis for 1997 Chase Plan with no mention of a minimum).

<sup>7</sup> Contrary to Plaintiff’s assertion that the 1994 SPD would “lead[] the average plan participant to the mistaken belief that there was a floor beneath which the rate could not drop,” Motion at 10, the 1994 SPD in no way suggests a *fixed* minimum interest rate. Rather, the 1994 SPD clearly states that the “minimum annual rate for interest credits is based on the average rate for one-year U.S. Treasury Bills (T-bills) for September, October and November of the previous year,” which is a *floating* rate. Compl. Ex. 9 at 14581. Plaintiff’s argument that “the level of financial literacy in the nation” and the fact that “less than 20% of people over the age of 50 . . . can compute compound interest” is beside the point. The inability to calculate compound interest has nothing to do with whether with “reasonable diligence” a plan participant could discover that tying the interest rate to the floating rate for U.S. Treasury bills did not mean that the interest rate could not drop below a certain level.

Complaint “disclosed with sufficient clarity . . . that the Plan administrator retained discretion to determine what interest rate would be used.” *Id.* at 24. This holding is correct because the communications clearly note that the setting of the interest rate was a discretionary decision. As recognized by the Court, “the 1992 SPD<sup>8</sup> plainly disclosed that ‘Chemical can provide for a[n] interest rate in excess of the minimum,’ and the 1994 SPD explained that ‘Chemical will adjust the rate annually.’” *Id.* Indeed, the 1994 SPD further made clear that this annually adjusted rate could range from the floating average rate based on one-year U.S. Treasury Bills to a “maximum rate” of 15%, and that Chemical would exercise its discretion and “announce the rate before the start of the next Plan year.” Compl. Ex. 9 at 14581.<sup>9</sup>

- **Count 3:** The crux of this Count is the allegation that the 1991 Chemical Plan violated ERISA because it did not specify an allegedly required method for projecting future interest credits for employees who retire and take their benefits before reaching age 65. The Court held that “plaintiff was on clear notice through SPDs and other notices issued prior to 2001 of the omissions identified” in Count 3. April 10 Order at 21. This holding is also correct because the communications clearly omitted any such method. As the Court noted, “[t]here is no mention...of any formula for calculating such credits.” *Id.* As the Court further noted,

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<sup>8</sup> Plaintiff’s objection to the Court’s consideration of the 1992 SPD, attached as Exhibit A to the Affidavit of Thomas C. Rice in support of Defendants’ Motion to Dismiss, rings hollow. Plaintiff could have raised any such objection in his Opposition to Defendants’ Motion to Dismiss, but declined to do so. While Plaintiff now says “there is no evidence that Bilello ever received the 1992 SPD,” he does not allege that Defendants failed to distribute an SPD for the 1991 Chemical Cash Plan, nor does he affirmatively state that he did not receive it. *See* Compl. ¶¶ 106-116. Consideration of the 1992 SPD was proper “because it is integral to the complaint, with its several allegations related to the 1989 Plan, whose terms are described in the SPD, which include claims of inadequate notice implicating the SPDs used to communicate the 1989 Plan’s terms.” April 10 Order at 21 n.12 (citing *Broder v. Cablevision Sys. Corp.*, 418 F.3d 187, 196 (2d Cir. 2005)). In any event, none of the Court’s holdings rely exclusively on the contents of the 1992 SPD. *See supra* pp. 9-10, *infra* pp. 10-12.

<sup>9</sup> Count 2 fails for the independent reason that Plaintiff has failed to assert an ERISA cause of action. Although not a subject of the April 24 Order (due to the dismissal of Count 2 in its entirety by the April 10 Order), Count 2 fails for same reasons as articulated in the April 24 Order with respect to what remained of Count 3. *See supra* n.1.

“the basis for [this claim] . . . arises from the face of the SPDs and the September 1990 Notice, and the statute of limitations for [this claim] accrues with the distribution of the SPDs and the September 1990 Notice.” *Id.* at 22. Additionally, although not specifically cited by the Court, additional statements in the 1992 SPD also support this holding. *See* 1992 SPD at 5 (“Chemical can provide for a rate in excess of the minimum, for any plan year.”).<sup>10</sup>

- **Count 4**: This claim alleges that the 1991 Chemical Plan violated ERISA because Defendants did not project future interest credits for employees who retire and take their benefits before reaching age 65. The Court likewise held that “plaintiff was on clear notice through SPDs and other notices issued prior to 2001 of the omissions identified” in Count 4. April 10 Order at 21. This holding is also correct because, as the Court noted, “[t]here is no mention of a projection of future interest credits.” *Id.* Applying the same rationale that warranted the dismissal of Count 3, the Court correctly noted that “the basis for [this claim] . . . arises from the face of the SPDs and the September 1990 Notice, and the statute of limitations for [this claim] accrues with the distribution of the SPDs and the September 1990 Notice.” *Id.* at 22. Although not cited by the Court, additional statements in the 1992 SPD and September 1990 Notice further support the holding that “Plaintiff was on clear notice” of the basis for his claim that Defendants did not project future interest credits for employees who leave Chemical and do not defer receipt of their benefit. *See, e.g.*, 1992 SPD at 13 (“Once you are vested, you can receive the value of your Cash Plan account when you leave the Company.”); Compl. Ex. 3 at 1738 (Noting that if you leave Chemical “you can take your account with you” but only “[i]f you leave Chemical and defer payment” will your account “earn[] interest at the regular interest rate until payment begins.”).

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<sup>10</sup> This Count fails for the independent reason that Plaintiff has failed to assert an ERISA cause of action. *See supra* n.1.

- **Count 6**: In this Count, Plaintiff alleges that the “minimum benefit” feature of the 1991 Chemical Plan led to this plan being backloaded. The Court properly held that “[t]he statute of limitations for Count 6 accrued with the distribution of the September 1990 Notice” that revealed the minimum benefit feature that forms the bases of Count 6. April 10 Order at 24-25. After quoting the language from the section of the September 1990 Notice entitled “Minimum Benefit,” the Court concluded that the minimum benefit feature was clearly made known to Bilello in 1990. “Count 6’s allegation that the minimum benefit feature violated ERISA (by creating the risk of backloading) is therefore untimely.” *Id.* at 25. Plaintiff now argues that the “Minimum Benefit” section could only have been sufficient to trigger the statute of limitations if it explicitly stated that the minimum protected benefit was not to be equal to the opening account balance. This argument must fail. There would be no need to have a “Minimum Benefit” provision if the opening account balance was going to equal to the minimum protected benefit and “reasonable diligence” would have allowed Plaintiff to discover that.<sup>11</sup> Additionally, the September 1990 Notice and 1992 SPD both clearly stated the opening account balance was derived from, but not necessarily equal to, the minimum protected benefit. *See* Compl. Ex. 3 at 1734 (“The prior service balance is *based on* the dollar value in your benefit under the Retirement Plan as of December 31, 1988.”) (emphasis added); 1992 SPD (“prior service balance [is] *generally based on* the benefit you had earned under the Retirement Plan as of December 31, 1988. Because this calculation is based upon

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<sup>11</sup> The 1994 SPD also placed Plaintiff on notice that the minimum protected benefit could be greater than the opening account balance: “If you were participating in the Chemical Retirement Plan on December 31, 1990, you will be entitled to the greater of your Cash Plan benefit or your minimum benefit. Your minimum benefit will equal your accrued benefit under the former Chemical Retirement Plan as of December 31, 1990.” Compl. Ex. 9 at 14586.

a number of assumptions and rules, it does not represent in all cases the benefit accrued under the Retirement Plan on December 31, 1988.”).

Accordingly, the Dismissed Counts all fail as a matter of law under the prevailing Second Circuit standard for determining when the statute of limitations accrues for ERISA claims.

### **III. LIMITING COUNT ONE TO THE 1997 PLAN WAS PROPER**

By limiting Count 1 to the 1997 Plan, the Court properly interpreted a poorly constructed Complaint. While the Court graciously afforded Plaintiff the benefit of the doubt with respect to whether Count 1 even applied to the 1997 Plan, *see* April 10 Order at 18 n.9 (noting that “[w]hile Count 1 addresses the 1997 Plan, the complaint’s prayer for relief only refers to the 1989 Plan.”), affording Plaintiff the same courtesy with respect to the 2002 and 2005 Plans is a step too far. Further, to the extent Plaintiff now alleges that Count 1 applies to the 2002 and 2005 Plans, that allegation fails to satisfy Rule 8. *See* Def. Motion to Dismiss at 16-17.

### **IV. PLAINTIFF CANNOT NOW ASSERT A CLAIM FOR EQUITABLE TOLLING OF THE STATUTE OF LIMITATIONS**

Plaintiff, for the first time, argues that his claims are entitled to tolling under the *American Pipe* doctrine. It is improper for Plaintiff to raise a new argument for the first time upon a motion for reconsideration. *See Koehler*, 2005 WL 1119371, at \*1 (“[A] motion for reconsideration cannot assert new arguments or claims which were not before the court on the original motion and consequently cannot be said to have been *considered*”) (emphasis in original). In the guise of seeking to “correct one minor error,” Plaintiff is really asking the Court to consider a new argument, namely equitable tolling of the statute of limitations, that Plaintiff failed to make in its Opposition. As the Court recognized, this argument was never raised: “[t]he

parties do not contend that Bilello's claims relate back to that filing, that that filing tolled the statute of limitations, or that shifting the accrual date to 2000 (six years before the related action was filed) would have any impact on this motion." April 10 Order at 10 n.4.<sup>12</sup> Accordingly, Defendants submit that it is improper for the Court to now consider the merits of any argument related to equitable tolling of the statute of limitations.<sup>13</sup>

**CONCLUSION**

For the foregoing reasons, Defendants respectfully request that this Court deny Plaintiff's Motion for Reconsideration of Court's April 10, 2009 Order Regarding Statute of Limitations.

Dated: New York, New York  
May 11, 2009

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<sup>12</sup> Furthermore, Plaintiff offers no argument regarding how, if at all, this tolling affects any of Plaintiff's claims or any portion of the Court's decisions.

<sup>13</sup> Notwithstanding the fact that Plaintiff has failed to articulate how, if at all, the *American Pipe* tolling doctrine impacts the April 10 Order, if the Court is inclined to consider Plaintiff's argument under the *American Pipe* tolling doctrine, Defendants respectfully request a more definitive argument from Plaintiff as to how and why he is entitled to *American Pipe* tolling, and an opportunity to respond.